

COMMENTS - IMC Phosphates failed to provide reasonable assurances it can make up for its damage to wetlands, fish and animal habitats if allowed to excavate a 2,300-acre phosphate mine in the headwater marshes of Horse Creek.

5 August 2003 – Sun-Herald

County wins phosphate suit

Judge: permit should be denied

By GREG MARTIN and ALLYSON GONZALEZ

Staff Writers

IMC Phosphates failed to provide reasonable assurances it can make up for its damage to wetlands, fish and animal habitats if allowed to excavate a 2,300-acre phosphate mine in the headwater marshes of Horse Creek.

Florida Administrative Law Judge J. Lawrence Johnston issued that conclusion Friday. Johnston recommended that the Florida Department of Environmental Protection deny a permit for IMC's Altman Tract.

The ruling handed Charlotte County its first major victory in a three-year, \$2 million court battle to compel the state to better protect the Peace River from the ravages of the phosphate industry.

The battle began with an administrative challenge of a permit for IMC's Manson-Jenkins mine, also slated for the headwaters of Horse Creek. The county lost that challenge, and lost a first appeal, but a final appeal to a state appellate judge remains pending.

The county then challenged the Altman permit. Friday's decision came based on testimony in a month-long trial held in April.

The county has also challenged a permit for IMC's 24,000-acre Ona mine. A trial for that challenge is set to begin in late September.

Ed de la Parte, Charlotte County's water-issues attorney, said Johnston's 120-page order contains several precedents that will "raise the bar" on the level of protection at all future phosphate mines.

"(The order) sets the bar for them where it should be -- not where they've practiced it, but where the Legislature intended," de la Parte said.

The judge, in one clause, agreed with DEP that Florida law merely requires that wetland impacts be mitigated. If wetland impacts are addressed, no cumulative impact study would be required.

However, Johnston then said IMC failed to mitigate even the wetland impacts.



10765263

"In this case, reasonable assurances were not given that proposed reclamation will offset (the) impact," Johnston stated.

IMC relied on testimony from its expert witness, engineer John Garlanger of Ardaman & Associates. Garlanger testified that the mine's impact on water flow would be insignificant.

But Garlanger's analysis only addressed water flow, Johnston noted. "It did not address the cumulative impacts from the loss of other wetland functions, fish and wildlife habitat functions.

"In addition, cumulative impacts from the loss of first-order streams might be significant," he added.

Johnston pointed out that 20 percent of the "first-order streams" in the Horse Creek basin are in areas where phosphate mining is planned.

Johnston also objected to IMC's plan to replace a variety of natural wetlands that serve varied functions with more homogenous wetlands that are typically deeper and stay wetter longer. The law requires wetlands to be replaced "acre-for-acre and type-for-type."

De la Parte said the judge's ruling may serve as a guide for DEP in the future. The state agency in the past has accepted wetlands that failed to provide the same function as the original wetlands.

"None of the projects we've reviewed attempt to even restore the stream systems that were intact prior to mining," de la Parte said. "At Altman, 200-plus acres of streams were going to be cut down to 16 acres. At Manson-Jenkins, 1.6 linear miles of streams weren't going to be replaced."

And at Ona, an entire section of Oak Creek was going to be eliminated, de la Parte added.

Johnston, however, indicated that IMC has failed to demonstrate that its mitigation can account for such impacts.

"That decision is going to have pervasive effects throughout all the mines," de la Parte said.

De la Parte attributed the victory to the will of the Charlotte County commissioners.

"The ones you really have to tip your hat to is the county commissioners," de la Parte said. "They've really taken a lot of heat. But the County Commission had a game plan since 2002, and they stuck to it."

"This is a significant victory for Charlotte County," said commission Chairman Matt DeBoer. "It would appear to me that we have been able to get the attention of judges that the phosphate industry is not meeting the requirements of the law.

"It gives us a good platform to launch our next attack on the permitting for phosphate mining," he added.

"The community needs to be proud of itself," said County Administrator Bruce Loucks. "This is a big win."

People around the state are starting to understand there are serious concerns about phosphates and the impacts of phosphate mines, Loucks added.

Diana Youmans, IMC spokeswoman, said her company is confident it can address the judge's concerns and win a permit for the Altman tract.

The company plans to review the judge's order and file exceptions within the next 15 days.

The judge's ruling serves as a recommendation to the DEP, which can issue the permit regardless of the order.